

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

MUR 6704

DATE COMPLAINT FILED: December 11, 2012¹

DATE OF LAST RESPONSE: Not Applicable

DATE ACTIVATED: April 2, 2013

EXPIRATION OF SOL: October 1, 2017 (estimated)

ELECTION CYCLE: 2012

COMPLAINANT:

Virgil H. Goode

RESPONDENTS:

John Doe

**RELEVANT STATUTES
AND REGULATIONS:**

2 U.S.C. § 434(b)(4)(G)

2 U.S.C. § 434(b)(4)(H)(iii)

2 U.S.C. § 434(b)(6)(A)

2 U.S.C. § 434(b)(6)(B)(iii)

2 U.S.C. § 434(c)

2 U.S.C. § 434(g)

2 U.S.C. § 441d

11 C.F.R. § 100.22

11 C.F.R. § 110.11

INTERNAL REPORTS CHECKED:

Disclosure reports

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

Virgil H. Goode, the U.S. Constitution Party candidate in the 2012 general election for U.S. President, filed a Complaint concerning two anonymous mailers distributed in Virginia the day before the general election. Statement of Organization (Feb. 14, 2012). The mailers compare the positions and actions of Goode and those of Mitt Romney, the Republican Party

¹ Goode filed an initial complaint by letter dated November 8, 2012, that was not notarized. See Compl. at 1,3. On December 11, 2012, he filed a notarized copy of the November 8 letter. *Id.* at 1-2.

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1 presidential candidate, on two issues: creating "American" jobs and gun owners' rights. Goode
2 states that although his name is on the mailers and many citizens believed he prepared them, he
3 had "nothing to do with them." Compl. at 2. He states that he would like to know if the mailings
4 comply with federal election laws and regulations, who paid for the mailings, and who sent them.
5 *Id.*

6 Both mailers, financed by an unknown party, contain an express advocacy phrase,
7 "Goode[]For[]President[]2012," in the domain name for Goode's presidential campaign
8 committee's website, www.GoodeForPresident2012.com. Compl. at 5-6. Based on the available
9 information, we recommend that the Commission find reason to believe that John Doe violated
10 2 U.S.C. § 441d for failing to include a disclaimer on the mailers. If a political committee made
11 the expenditures for the mailers, it should have reported them in Commission disclosure reports.
12 If a person other than a political committee made the expenditures and the cost exceeded \$250,
13 the person should have filed independent expenditure statements with the Commission.
14 Therefore, we also recommend that the Commission find reason to believe that John Doe
15 violated 2 U.S.C. §§ 434(b)(4) and (b)(6) or 434(c). In addition, because it appears that the
16 mailers were distributed in the days just before the general election, the unknown party may have
17 been required to file a 24-hour independent expenditure notice. Therefore, we recommend that
18 the Commission find reason to believe that John Doe violated 2 U.S.C. 434(g). Finally, we
19 recommend that the Commission authorize a limited investigation.

20 II. FACTUAL BACKGROUND

21 Goode enclosed with his complaint the two mailers at issue. Both mailers are two-sided
22 pieces, measure approximately 12 ½ by 8 ½ inches, are printed on heavy-weight paper using

1 multiple colors, and bear photographs of Goode and Romney. According to Goode, the mailers
2 were received by many Virginians the day before the general election. *Id.* at 2.

3 The first mailer concerns jobs (the "Jobs" mailer). *Id.* at 4-5. On the front of the mailer
4 next to the photo of a person, the mailer states in a large font: "Our jobs are being shipped to
5 China." Below that in smaller typeface the mailer reads, "and who profits?," next to a photo of
6 Romney. The back of the mailer contains a side-by-side comparison of the positions and actions
7 of Virgil Goode and Mitt Romney on "American" jobs. On the left side, next to a photo of
8 Virgil Goode, the mailer states, "Southside Virginia's Own Virgil GOODE: Keeping American
9 jobs in America." Boxed bullet points below that state: "Goode knows the number one priority
10 must be creating new jobs here in the United States"; "[o]pposed to NAFTA and CAFTA, Goode
11 is committed to keeping American jobs in America"; and "Virgil Goode knows we need to create
12 jobs here in the United States - not in foreign countries. That is why he opposed NAFTA and
13 CAFTA." The last line in the box reads: "Call Virgil Goode (540) 483-9030 and tell him you
14 support his plan to get Americans back to work." In smaller type near the bottom, the mailer
15 states, "For more information, visit www.GoodeForPresident2012.com," Goode's presidential
16 campaign website.

17 Comparative information about Romney appears on the right side. Next to a photo of
18 Romney, the mailer states, "Massachusetts Mitt ROMNEY: A record of shipping American jobs
19 overseas." Three boxed, sourced bulleted statements about Romney's positions or actions on
20 jobs appear below. The statements say that Romney "outsourced American jobs to India" as
21 Massachusetts governor, "shipped American jobs to foreign countries like China, South Korea
22 and Taiwan" as head of Bain Capital, and opposed efforts to strengthen "Buy American" laws.

Sources for the statements are cited above the invitation to visit Goode's website. No corresponding invitation to visit Romney's campaign website is included.

The second mailer compares the candidates' positions on gun-owners' rights with Romney's position on the front of the mailer and Goode's on the back (the "Gun Owners" mailer). *Id.* at 6-7. It features the same photos of the candidates as those used in the Jobs mailer, although different in size.

On the front of the Gun Owners mailer, a word balloon appears next to the photo of Romney reading, "I DON'T LINE UP WITH THE NRA." Above the text of Romney's position is a graphic of a shield with the words "RATED D-" and a ribbon around it bearing the name "Gun Owners of America." A red circle around the rating "D-" overlaps the bottom of the shield. Below this graphic, the main text reads:

The Romney Plan on Gun Rights:

Mitt Romney has failed to help protect our gun rights. As governor of Massachusetts he signed legislation that restricted gun owners' rights.(1) He has attacked the National Rifle Association, saying "I don't line up with the NRA" and supported federal laws that restrict gun owners' rights.(2) It is no wonder that Gun Owners of American gave him a D-minus grade for his poor record.(3)

The sources corresponding to the numbers (1), (2), and (3) are cited in smaller type at the bottom of the page.

On the back of the Gun Owners mailer to the left of Goode's photo is a quotation attributed to Goode on April 21, 2012: "I have always consistently been for and supported the right of the individual to keep and bear arms." As in the Romney section, a graphic of a shield bearing a ribbon with the name "Gun Owners of America" and a circled rating appear above the text of Goode's positions; this time the rating is an "A+." Below these graphics, the mailer reads:

1 Virgil Goode: a steadfast supporter of our gun rights

2
3 Virgil Goode has been rated A+ by the NRA and the Gun Owners of
4 America.⁽¹⁾ He has a long steadfast record of standing up for our Second
5 Amendment rights. He opposes any new restrictions on gun owners' rights.

6
7 Call Virgil Goode (540) 483-9030 and tell him you stand with him on the
8 Second Amendment.²

9
10 The source for the citation to Goode's ratings is on the bottom of the page. Above that,
11 as in the Jobs mailer, the Gun Owners mailer reads, "For more information, visit
12 www.GoodeForPresident2012.com." Both mailers were sent via bulk mail with no return
13 address, and each bears a bulk mail permit imprint.

14 **III. LEGAL ANALYSIS**

15 **A. Failure to Include a Disclaimer**

16
17 The Federal Election Campaign Act of 1971, as amended (the "Act"), requires that
18 whenever a political committee makes a disbursement for the purpose of financing any
19 communication through any mailing or other type of general public political advertising, the
20 communication must clearly state that it has been paid for by the political committee. 2 U.S.C.
21 § 441d(a). The Commission's regulations further specify that political committees must include
22 disclaimers on "all public communications." 11 C.F.R. § 110.11(a). A "public communication"
23 includes a "mass mailing," defined as a mailing of more than 500 pieces of mail matter of an
24 identical or substantially similar nature within any 30-day period.³ 2 U.S.C. §§ 431(22), (23). In

² Both mailers list the phone number of Goode's campaign.

³ The statewide nature of the presidential election in which Goode appeared on the ballot makes it likely that more than 500 pieces of each mailer were distributed. At a minimum, at least 200 mailers were distributed because the bulk mail permit imprint reflects that the mailers were sent by Standard Mail. The U.S. Postal Service ("USPS") requires a minimum of 200 pieces or 50 pounds of mail to qualify for the Standard Mail bulk mail discount. See <http://pe.usps.com/businessmail101/getstarted/bulkmail.htm>.

1 addition to requiring disclaimers on all public communications financed by political committees,
2 all public communications that expressly advocate the election or defeat of a clearly identified
3 candidate must include a disclaimer. 2 U.S.C. § 441d(a); *see also* 11 C.F.R. § 110.11(a)(2).

4 Communications authorized and paid for by a candidate, an authorized committee of a
5 candidate, or an agent of either, must clearly state that the communications were paid for by the
6 authorized political committee. 2 U.S.C. § 441d(a)(1). Communications authorized by a
7 candidate, an authorized committee of a candidate, or an agent of either but paid for by another
8 person, must clearly state that the communications were paid for by such person but authorized
9 by the political committee. *Id.* § 441d(a)(2). Finally, a communication not authorized by a
10 candidate, an authorized committee, or an agent of either, must clearly state the name and
11 permanent street address, telephone number, or World Wide Web address of the person who paid
12 for the communication and state that the communication was not authorized by any candidate or
13 candidate's committee. *Id.* § 441d(a)(3).

14 As public communications, the mailers would have required a disclaimer if they
15 contained express advocacy. A communication expressly advocates the election or defeat of a
16 clearly identified federal candidate if it uses "phrases" such as "Smith for Congress" or "Bill
17 McKay in '94" among other enumerated examples, or "communications of campaign slogan(s)
18 or individual word(s), which in context can have no other reasonable meaning than to urge the
19 election or defeat of one or more clearly identified candidates such as posters, bumper stickers,
20 advertisements, etc., which say 'Nixon's the One,' 'Carter '76,' 'Reagan/Bush,' or 'Mondale!'"
21 11 C.F.R. § 100.22(a); *see also* *Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976) (concluding that
22 "express words of advocacy" include terms such as "Smith for Congress"). The Commission
23 explained that the phrases enumerated in section 100.22(a), such as "Smith for Congress" and

1 "Bill McKay in '94," have no other reasonable meaning than to urge the election or defeat of a
2 clearly identified candidate. *See* Express Advocacy; Independent Expenditures; Corporate and
3 Labor Organization Expenditures, 70 Fed. Reg. 35,292, 35,294-35,295 (July 6, 1995)
4 (explanation and justification) ("E&J"); *see also* Factual & Legal Analysis at 4-5, MUR 6170
5 (Tuscola County Democratic Committee) (concluding that an advertisement's use of phrases
6 specifically enumerated in 11 C.F.R. § 100.22(a) "fall[s] squarely within the definition of
7 express advocacy").

8 The mailers at issue invite recipients to visit the website "www.GoodeFor
9 President2012.com." Although it appears only as part of a domain name, the phrase
10 "Goode[]For[]President[]2012" contains "express words of advocacy" all but identical to
11 "Smith for Congress" and "Bill McKay in '94." 11 C.F.R. § 100.22(a); *see also* *Buckley*, 424
12 U.S. at 44 n.52. By definition, then, the phrase itself has no other reasonable meaning than to
13 urge the election of Goode. E&J at 35,295. The mailers, therefore, literally contain express
14 advocacy under section 100.22(a).

15 We recognize that applying the so-called "magic words" bright-line formulation to
16 language of advocacy that occurs only in an internet domain name may well yield formalistic or
17 absurd results depending on the circumstances presented in a particular matter. In such cases,
18 the Commission is vested with discretion to dismiss the matter in the regular ordering of its
19 priorities under *Heckler v. Chaney*.⁴

20 Nonetheless, on the facts presented here an express advocacy finding would not warrant
21 dismissal. The additional content of the mailers and the manner in which the domain name

⁴ 470 U.S. 821 (1985).

1 appears together enhance the exhortative call in the domain name to vote for Goode. For
2 instance, the Jobs mailer compares Romney's record of "shipping American jobs overseas" with
3 Goode's plan of "[k]eeping American jobs in America," while the Gun Owners' mailer compares
4 Romney's support for gun control measures with Goode as a "steadfast supporter of our gun
5 rights." Compl. at 5-7. In this, the context of the advertisements in which the "magic words"
6 appear serves to amplify the message presented in the domain name similar to the circumstances
7 found in MUR 4313 (Coalition for Good Government, Inc.). In that matter, a television
8 advertisement included the photos of four presidential candidates along with background images
9 of bumper stickers expressly advocating their election. Factual and Legal Analysis at 9-10,
10 MUR 4313. Although each of the four bumper stickers contained so-called "magic words"
11 phrases under section 100.22(a),⁵ the Commission concluded that the advertisement expressly
12 advocated the election of only one of those candidates, Richard Lugar. The Commission found
13 that the advertisement gave prominence to Lugar because the "Richard Lugar for President"
14 phrase on his bumper sticker was combined with the positive statements on an issue associated
15 with him and the lack of comparable statements about the positions of the other three presidential
16 candidates featured in the advertisement. *See id.* at 21-22. Similarly, here too the mailers
17 include literal words of express advocacy together with positive statements about and a flattering
18 photo of Virgil Goode, and accord Goode greater prominence by criticizing his opponent, all
19 while providing Goode's campaign website —along with its electoral exhortation — but not
20 Romney's.

⁵ See Conciliation Agreement ¶ IV.2, MUR 4313. This Office observed in that matter that, although the other bumper stickers in the advertisement contained words of express advocacy in favor of the candidates, the message of the advertisement as to those candidates was negative. *See* First Gen. Counsel's Rpt. at 31 n.6, MUR 4313.

1 Accordingly, because the anonymous mailers expressly advocated the election of Goode,
2 they required a disclaimer regardless of who paid for and authorized them.⁶ Therefore, we
3 recommend that the Commission find reason to believe that John Doe violated 2 U.S.C. § 441d
4 by failing to include disclaimers on the mailers at issue in this matter.

5 **B. Failure to Report Expenditures/Independent Expenditures**

6 Under the Act, authorized committees must file reports disclosing, *inter alia*, all
7 disbursements; similarly, unauthorized political committees must file reports disclosing, *inter*
8 *alia*, their independent expenditures. *See* 2 U.S.C. §§ 434(b)(4)(G) (requiring authorized
9 committees to disclose all other disbursements); *id.* § 434(b)(4)(H)(iii) (requiring unauthorized
10 political committees to disclose all independent expenditures); *see also id.* § 434(b)(6)(A),
11 (B)(iii) (requiring political committees to identify persons receiving disbursements generally and
12 those in connection with independent expenditures aggregating in excess of \$200 within the
13 calendar year and describing other specific content requirements). In addition, every person
14 other than a political committee that makes independent expenditures in an aggregate amount
15 that exceeds \$250 during a calendar year must file a statement disclosing them. *Id.* § 434(c).
16 Depending on the amount and timing of the expenditures, a person, including a political
17 committee, may have to file a 24-hour independent expenditure notice. *Id.* § 434(g)(1)(A)
18 (requiring 24-hour notices for independent expenditures aggregating \$1,000 or more made after
19 the 20th day, but more than 24 hours before, the date of an election).⁷

⁶ A disclaimer would have been required even if the mailers did not contain express advocacy if John Doe is a political committee.

⁷ Political committees and other persons must file 24-hour notices by 11:59 p.m. on the day following the date on which the independent expenditure communication is publicly distributed. *See* 11 C.F.R. §§ 104.4(c); 109.10(d).

1 Here, regardless of who financed the mailers, the available information suggests that
2 expenditures for them should have been disclosed in a report or statement filed with the
3 Commission. If either an authorized or unauthorized political committee made the expenditures,
4 the committee should have disclosed them in a regular disclosure report. *See id.* § 434(a)(2), (3),
5 and (4). If a person other than a committee made the expenditures and they exceeded \$250, the
6 person should have filed an independent expenditure statement with the Commission. *See id.*
7 § 434(c)(1). Accordingly, we recommend that the Commission find reason to believe that John
8 Doe violated 2 U.S.C. §§ 434(b)(4) and (b)(6) or 434(c) by failing to report expenditures made in
9 connection with the mailers. In addition, because the mailers were apparently distributed in the
10 days just before the general election, the unknown party may have been required to file 24-hour
11 independent expenditures notices if the amounts expended exceeded \$1,000. Accordingly, we
12 recommend that the Commission find reason to believe that Jon Doe violated 2 U.S.C. § 434(g).

13 **IV. PROPOSED DISCOVERY**

14 We propose to conduct a limited investigation to identify the person or persons who paid
15 for and authorized the mailers, discover the cost of the mailers, and determine the scope and
16 dates of their distribution.

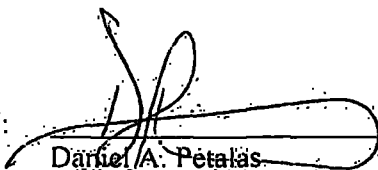
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19
20
21 **V. RECOMMENDATIONS**

- 22 1. Find reason to believe that John Doe violated 2 U.S.C. § 441d.
23
24 2. Find reason to believe that John Doe violated 2 U.S.C. §§ 434(b)(4) and (b)(6) or (c)(1).

3. Find reason to believe that John Doe violated 2 U.S.C. § 434(g).
4. Authorize the use of compulsory process, including the issuance of appropriate interrogatories, document subpoenas, and depositions subpoenas, as necessary.
5. Approve the attached Factual and Legal Analysis.⁸
6. Approve the appropriate letters.

3/6/14
Date

BY:


Daniel A. Petalas

Associate General Counsel for Enforcement


Susan L. Lebeaux

Assistant General Counsel


Dawn M. Odrovski

Attorney

⁸ The Factual and Legal Analysis will be sent to the party responsible for the mailers once its identity is ascertained in the investigation.